CHAW ANUI

v.

TAN KIM CHAI (NO 2)

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[PETITION NO: MT3-33-126-1999]
6 DECEMBER 2004

CIVIL PROCEDURE: *Execution - Stay - Application for stay of execution pending appeal - Principles applicable - Whether stay ought to be granted*

This was an application by the respondent ('the husband') for a stay of an order of this court ('the order') pending the disposal of an appeal filed by the husband to the Court of Appeal. The order essentially contained the following terms (paras. 1 to 9 respectively): (1) a lump sum payment of RM1,000,000 less the interim maintenance of RM1,500 per month paid by the husband to the wife with effect from August 2000, and the said lump sum to be secured by way of bungalow no. 5; (2) an amount of RM1,000,000 to be paid by the husband to the wife for all the portfolios of shares; (3) the transfer of bungalow no. 2 by the husband to the wife immediately, free from all encumbrances; (4) the division of assets of two companies in proportion to their respective shareholding in the two companies by way of cash payment; (5) the husband be restrained from disposing of the properties; (6) after the division of the relevant properties, the wife be discharged from all guarantees and securities executed in favour of the two companies; (7) the husband pay the costs of proceedings; (8) the removal of the wife as director, shareholder and guarantor of the two companies; and (9) all documents pertaining to a certain vehicle to be surrendered by the wife to the husband. The only issue requiring determination was whether or not the stay should be granted.

Held:

[1] Reverting to the facts and circumstances of this case and in the light of the husband's proposal of the initial payment of RM100,000 by way of interim maintenance for the wife pending the husband's appeal to the Court of Appeal, para. 1 of the order should be stayed, subject to the conditions that: (i) the husband pays the initial annual maintenance of RM100,000 before 15 December 2004; (ii) if the husband's appeal has yet to be heard by 15 December 2005, the husband shall pay the next and subsequent annual maintenance on or before 15 December of the

following years until full settlement; (iii) the security for the said maintenance by way of bungalow no. 5 shall continue; (iv) in the event of default by the husband, the balance due on the entire maintenance shall become due and payable forthwith; (v) on or before the first day of every quarter of the year, the husband's counsel shall write to the registrar of the Court of Appeal to request a date of hearing of the appeal. (pp 176 f-h & 177 a-c)

[2] Regarding the transfer of bungalow no. 2 by the husband to the wife in para. 3 of the order, the wife, like any other reasonable human being, was entitled to the fundamental need of having a roof over her head as her place of abode according to her station in life after 34 years of marriage to the husband. However, this court was prepared to order a stay of para. 3 subject to the conditions that: (i) the husband delivers exclusive, peaceful and quiet possession of bungalow no. 2 to the wife on or before 1 June 2005, or upon the existing tenant giving up vacant possession thereof; (ii) in the event of default by the husband, the stay of para. 3 of the order shall lapse and the wife shall be at liberty to execute the same forthwith; and (iii) for the purposes of condition (ii) herein, the husband shall settle the redemption sum in order to redeem the property from the chargee bank, if any, and shall execute all necessary documents to effect the discharge of the charge and the transfer of the property to the wife. (p 177 d-h)

[3] On the facts and circumstances of this case, paras. 2, 6, 7 and 8 of the order were also stayed. There was no stay in respect of paras. 4 and 5; since para. 9 of the order had been executed, there was no further order in relation thereto. (p 178 a-c)

[Ordered accordingly.]

Case(s) referred to:

Atkins v. Great Western Railway Co 2 TLR 400 ***(refd)***

Chaw Anui v. Tan Kim Chai [2004] 5 AMR 671 ***(refd)***

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***

Lai Lai Yin v. MV "Yih Shen", Owners of and Other Persons Interested [1986] 2 MLJ 65 ***(refd)***

Hong Leong Finance Bhd v. Hon Hoi Weng & Ors [1987] 2 CLJ 227 HC ***(refd)***

Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2) [1976] 1 MLJ 131 ***(refd)***

Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 3 CLJ 380 CA ***(refd)***

Kerajaan Malaysia v. Dato' Haji Ghani Gilong [1995] 3 CLJ 161 FC ***(refd)***

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, vol 17, para 455

For the wife - Satchithanandhan; M/s W Satchithanandhan & Co
For the husband - Foo Yet Ngo; M/s YN Foo & Partners

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing J:

Application

Pending the disposal of appeal No. B-02-852-04 filed by the respondent husband ("the husband") in the Court of Appeal, the husband has filed this application by way of summons in chambers in encl. (78) for a stay of the order which I made on 10 July 2004 in the following terms:

1. A lump sum payment of RM1,000,000 less the interim maintenance of RM1,500 per month paid by the husband to the wife with effect from August 2000, and the said lump sum payment to be secured by way of Bungalow No. 5;

2. An amount of RM1,000,000 to be paid by the husband to the wife for all the portfolios of shares;

3. The transfer of Bungalow No 2 by the husband to the wife immediately, free from all encumbrances;

4. The assets held in the name of LPI(M) and Sathyam Holding at the net value as at the date of decree nisi, to be divided in proportion to their respective shareholdings in the two companies by way of cash payment on or before 1 August 2005;

5. That the husband be restrained from charging, selling or otherwise disposing of any of the properties referred to in this judgment save and except in compliance with the order of this court;

6. That after the division of the relevant properties in accordance with this order, the wife be discharged from all guarantees and securities executed by the wife in favour of the two companies;

7. The husband to pay the wife costs of the proceedings in this petition;

8. In respect of the cross-petition by the husband, an order that the wife shall forthwith be removed as director, shareholder and guarantor of the two companies given in favour of banks and financial institutions and all caveats entered by the wife on all the properties in these proceedings be removed forthwith; and

9. All documents including the release letter pertaining to vehicle bearing registration No. WEV 9009 shall forthwith be surrendered by the wife to the husband, (see *Chaw Anui v. Tan Kim Chai* [2004] 5 AMR 671 at pp. 696 and 697).

On 8 November 2004, I allowed the wife's application in encl. (86) to amend the order so as to include the particulars of title for Bungalow 2 and Bungalow 5 *viz*. HS (D) 40313, Lot No. 27141, Mukim of Petaling, Kuala Lumpur; and HS (D) 40314 Lot No. 27142 Mukim of Petaling, Kuala Lumpur respectively. For the avoidance of doubt, all references hereinafter to Bungalow No. 2 and Bungalow No. 5 shall be deemed to include and be identified by the particulars of the title respectively.

The terms of my order shall be referred according to the aforesaid paragraphs.

Factual Background

This has been set out in great deal in my judgment in [2004] 5 AMR 671 after a protracted trial in open court and would require no repetition here.

Submissions By Counsel And Decision Of Court

Learned counsel for the husband Ms YN Foo assisted by Ms Faridah Abdullah submitted that the order for payments and transfer of assets to the wife would necessarily involve disposing of the husband's assets, thus depriving the husband of his source of income, while disposal of the LPI (M) and Sathyam Holding assets would deprive the shareholders of the benefit and income therefrom.

They added that upon the transfer of Bungalow No. 2 to the wife, the wife may sell or dispose of it and deprive the husband of the result of the appeal, and that it is doubtful that the wife would be able to repay the husband if the husband's appeal is allowed.

It was also argued for the husband that the wife was not in want of money and that on the basis of *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1 FC, special circumstances exist for the stay to be granted.

In the alternative, the husband has proposed the immediate payment by him to the wife of an initial sum of RM100,000 which represents more than a year's maintenance, as a condition of the stay pending appeal.

In asking the court to refuse stay, Mr. W. Satchithanandhan learned counsel for the wife relied on *Lai Lai Yin v. M.V. "Yih Shen", Owners of and other persons interested* [1986] 2 MLJ 65 HC; *Hong Leong Finance Bhd. v. Hon Hoi Weng & Ors*. [1987] 2 CLJ 227 HC; *Re Kong Thai Sawmill (Miri) Sdn. Bhd.; Ling Sung v. Kong Thai Sawmill (Miri) Sdn. Bhd. & Ors. (No. 2)* [1976] 1 MLJ 131; *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380 CA; and *Kosma Palm Oil, supra,* FC.

In my view, a good starting point is to restate the established principles that may be culled from the authorities cited for the parties herein and apply them to the facts and circumstances of this case in order to determine whether to grant or refuse the stay or to make an order that ensures that justice is seen to be done to the parties, pending the disposal of the husband's appeal by the Court of Appeal.

The established principles may be distilled as follows:

1. The court has an absolute and unfettered discretion to grant or refuse a stay. It is incumbent upon the applicant to show from the affidavit the special circumstances to enable the grant of a stay of execution: per Mohd Dzaiddin J (later CJ Malaysia) in *Lai Lai Yin, supra, Halsbury's Laws of England,* 4th edn. vol. 17 para. 455; *Ming Ann Holdings, supra* per Abdul Hamid Mohamad JCA; *Re Thong Thai Sawmill, supra,* FC; *Kerajaan Malaysia v. Dato' Haji Ghani Gilong* [1995] 3 CLJ 161;

2. The fact that the defendants believe they have a reasonable chance of success in the appeal is no ground for granting a stay: *Lai Lai Yin, supra; Atkins v. Great Western Railway Co.* 2 TLR 400;

3. A distinction has to be drawn between a matter that was decided after full trial and enquiry and one summarily arrived at by a registrar. In the former case, the general rule no doubt continues to be that special circumstances have to be shown (there could no doubt be exceptions to the general rule). But in the latter case, a demonstration that the probabilities are in favour of the appeal being allowed should normally be sufficient: per VC George J (later JCA) in *Hong Leong Finance, supra*);

4. A successful litigant should not be deprived of the fruits of a judgment obtained in his favour: *Ming Ann Holdings, supra*;

5. The most important factor for paramount consideration appears to be whether the appeal, if successful, is rendered nugatory: *Ming Ann Holdings, supra;*

6. The function of the court is not to look at the phrases such as "special circumstances" or "rendered nugatory" used in the affidavit in support of the application but to look at the substance, and consider the facts and the circumstances of the case: *Ming Ann Holdings, supra*;

7. A fear of losing business, customers, suppliers, goodwill and of not being able to collect debts from third parties are not special circumstances nor would they render nugatory a successful appeal.

8. There are many factors that may constitute special circumstances, an example of which is the fact that an appeal would be rendered nugatory if stay was refused: per Augustine Paul JCA in *Kosma Palm Oil, supra;*

9. The risk that the applicant would dispose of the assets if stay were granted may result in the refusal to grant a stay: *Kosma Palm Oil, supra;* and

10. The losses that an applicant would suffer and the inconvenience an applicant would incur if the order was not stayed would militate against the rationale that a stay is granted only for reasons that relate to the enforcement of the judgment: *Kosma Palm Oil, supra.*

Reverting to the facts and circumstances of this case and in the light of the husband's aforesaid proposal of the initial payment of RM100,000 by way of interim maintenance for the wife pending husband's appeal to the Court of Appeal, I am of the view that para 1 of my order should be stayed, which I hereby order, subject however to the conditions that:

(1) the husband do pay the initial annual maintenance of RM100,000 on or before 15 December 2004;

(2) if by 15 December 2005, the husband's appeal has yet to be heard and determined by the Court of Appeal, the husband shall pay the next and subsequent annual maintenance of RM100,000 on or before 15 December of the next and subsequent years, until the maintenance of RM1,000,000 as stated in para 1 of my order has been fully and finally settled or until further order of this court or the Court of Appeal whichever is the earlier;

(3) the security for the said maintenance by way of Bungalow No. 5 shall continue until further order of this court or the Court of Appeal;

(4) in the event of a default by the husband to pay the initial annual maintenance of RM100,000 on or before 15 December 2004 or 15 December of the next and subsequent years, the balance due on the entire maintenance in para 1 of my order shall become due and payable forthwith; and;

(5) on or before the first day of every quarter of the year, the husband's learned counsel shall write to the registrar of the Court of Appeal to request for a date of hearing of the husband's appeal.

Regarding the transfer of Bungalow No. 2 by the husband to the wife in para 3 of my order, I am of the view that the wife, like any other reasonable human being, is entitled to the fundamental need of having a roof over her head as her place of abode according to her station in life after 34 years of marriage to the husband. However, I am prepared to order a stay of para 3 of my order which I hereby do, subject however to the conditions that:

(1) the husband do deliver exclusive, peaceful and quiet vacant possession of Bungalow No. 2 to the wife on or before 1 June 2005 or upon the existing tenant giving up vacant possession thereof, whichever is the earlier, as her place of abode without any harassment or breach of the peace by the wife, and without any interference or trespass by the husband who is also hereby restrained from dealing, leasing or otherwise disposing of Bungalow No. 2 until the appeal is heard and determined by the Court of Appeal or until further order of this court or the Court of Appeal;

(2) in the event of default by the husband in delivering the said vacant possession to the wife on or before 1 June 2005, the stay of para 3 of my order shall lapse and the wife shall be at liberty to execute the same forthwith; and

(3) for the purposes of condition (2) herein, the husband shall settle the redemption sum in order to redeem the property from the chargee bank, if any, and shall execute all necessary documents to effect the discharge of charge and the transfer of the property to the wife, and in the event of the refusal by the husband to execute the transfer documents, the registrar of this court is hereby authorised to do the same, and present the same for registration of the transfer with all the relevant authorities.

On the facts and circumstances of this case, I order a stay of paras 2, 6, 7 and 8 of my order. There shall be no stay in respect of para 5 of my order.

There shall also be no stay in respect of para 4 of my order, but at the request of the husband, the parties herein are ordered to execute all relevant documents, including the documents for the removal of any private caveat entered by the wife, for the purposes of effecting the transfer to the purchaser or purchasers of the assets stated therein and in the event of any default by any of the parties herein to execute the said relevant documents, the registrar of this court is hereby authorised to execute and present the same for registration of the transfer with all the relevant authorities.

As para 9 of my order has been executed, there shall be no further order in relation thereto.

The parties herein shall bear their respective costs of this application.